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12 *Attorneys for Plaintiffs*

13
14 UNITED STATES DISTRICT COURT
15 DISTRICT OF ARIZONA
16

17 Point of Choice Consulting, LLC, an
18 Arizona limited liability company;
19 Mike Hoeffel and Chareis Hoeffel, a
20 married couple,

21 Plaintiffs

22 vs.

23 Right Path, LLC, an Arizona limited
24 liability company; Right Path Center,
25 Inc., an Arizona corporation; Wali
26 Muhammad; Jaleela Muhammad; and
27 Kyona Relf,

28 Defendants

Case No.2:22-CV-00274-DGC

(Maricopa County Superior Court Case No.
CV 2021-018860)

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
RULE 55(c) MOTION TO SET
ASIDE ENTRY OF DEFAULT
FILED BY THE CLERK'S
OFFICE ON MARCH 31, 2022**

Right Path, LLC, an Arizona limited liability company; Right Path Center, Inc., an Arizona corporation; Wali Muhammad; Jaleela Muhammad; and Kyona Relf,

Counterclaimants,

vs.

Point of Choice Consulting, LLC, an Arizona limited liability company; Mike Hoeffel and Chareis Hoeffel, a married couple,

Counterdefendants.

Right Path, LLC, an Arizona limited liability company; Right Path Center, Inc., an Arizona corporation; Wali Muhammad; Jaleela Muhammad; and Kyona Relf,

Third Party Plaintiffs,

vs.

Point of Choice Consulting, LLC, an Arizona limited liability company; Mike Hoeffel and Chareis Hoeffel, a married couple,

Third Party Defendants.

In Defendants' Right Path, LLC, Right Path Center, Inc., Wali Muhammad, Jaleela Muhammad, and Kyona Relf (collectively, the "**Defendants**") Rule 56(c) Motion to Set Aside Entry of Default [DE 69] (the "**Set Aside Motion**"), Defendants fail to provide the requisite "good cause" to set aside their default. Plaintiffs Point of Choice Consulting, LLC ("**POCC**") and Mike and Chareis Hoeffel (the "**Hoeffels**" and, with POCC, "**Plaintiffs**") respectfully request this Court deny the Set Aside Motion.

MEMORANDUM OF POINTS AND AUTHORITIES¹

I. Relevant Factual and Procedural Background

This action arises from services and loans Plaintiffs provided to Defendants pursuant to various contracts. It also deals with the ownership and corporate governance of Right Path (an Arizona LLC) and Right Path Center, Inc. (“**RPC**”) (an Arizona Corporation).

Between June and December 2021, Plaintiffs unsuccessfully attempted to resolve this matter with Defendants before litigating. However, when that was unsuccessful, Plaintiffs filed their Complaint in Maricopa County Superior Court on December 12, 2021, asserting claims sounding in Arizona contract, tort, and corporate law.

On December 13, 2021, Plaintiffs’ counsel provided the Complaint to Defendants’ counsel of record by email, asking if counsel was authorized to accept service on behalf of Defendants. *See Exhibit A.* Defendants’ counsel indicated she would reach out to Defendants concerning her authority to accept service. *See Exhibit B.* Defendants’ counsel indicated that she was authorized to accept service on December 21, 2021. *See Exhibit C.* Plaintiffs’ counsel provided a form of acceptance of service to Defendants’ counsel on December 28, 2021. *See Exhibit D.* Defendants then delayed nearly a month before serving a modified document that ambiguously accepted or waived service on January 19, 2022. *See Exhibit E.*

On February 22, 2022, Defendants filed the Notice of Removal to the United States District Court, District of Arizona. (Doc. 1). Because the Notice of Removal was late and this Court lacks subject matter jurisdiction over the

¹ Plaintiffs addressed set aside in their Motion to Strike (Doc. 69). The Relevant Factual and Procedural Background and portions of the Legal Analysis are near carbon-copies of Plaintiffs’ Motion to Strike. Therein, Plaintiffs argued there is not the requisite good cause to set default aside. The issues here are the same but for Plaintiffs’ direct responses to Defendants’ wayward arguments and additional procedural history.

1 Complaint, Plaintiffs filed a Motion to Remand on March 21, 2022. (Docs. 13).

2 Meanwhile, on March 4, 2022, Defendants filed an uncontested Motion
3 for Extension of Time to File Answer (second request), requesting an
4 extension of time to respond to March 10, 2022. Then on March 23, 2022,
5 Defendants filed an uncontested Motion for Extension and Short Additional
6 Enlargement of Time for Defendants to Answer (third request), requesting an
7 extension of time to respond to March 25, 2022. (Doc. 14). This was the third
8 time extension Defendants requested and received, all without dispute from
9 Plaintiffs. The Court granted that Motion on March 23, 2022. (Doc. 15).

10 Defendants failed to file an answer or any other responsive pleading by
11 March 25, 2022. Therefore, on March 28, 2022, Plaintiffs filed their
12 Application for Entry Default against the Defendants supported by a proper
13 Affidavit. (Doc 16). The Clerk entered Defendants' default on March 31,
14 2022. (Doc. 17).

15 On April 7, 2022, Defendants filed their Answer, Counterclaims, and
16 Third Party Claims ("**Answer**"). (Doc. 18). Defendants then filed their
17 Corrected/First Amended Counterclaims, and Third Party Claims on April 12,
18 2022 ("**Amended Answer**"). (Doc. 19).

19 Plaintiffs moved to strike the Answer and Amended Answer because
20 they were filed after default was entered against Defendants. (Doc. 69).

21 **II. Legal Analysis**

22 **A. There is not good cause to set aside default.**

23 Rule 55(c) provides for the set aside of entry of default for "good cause."
24 Fed. R. Civ. P. 55(c). The party seeking to set aside default bears the burden
25 of showing good cause. *Franchise Holding II, L.L.C. v. Huntington Rests. Grp,*
26 *Inc.*, 375 F.3d 922, 926 (9th Cir. 2004). Three factors determine whether
27 there is good cause to set aside the entry of default: (1) whether [defendant]
28

1 engaged in culpable conduct that led to the default; (2) whether [defendant]
2 had a meritorious defense; or (3) whether reopening the default judgment
3 would prejudice [plaintiff]”. *Id.* The Court may deny a request to set aside if
4 any one of the three factors are not satisfied. *Id.*

5 Defendants fail to address factors (1) and (2) in their Set Aside Motion,
6 which may alone be fatal to that Motion because it is Defendants’ burden to
7 show good cause and the Court may decline to set aside for failure to carry
8 just one factor. *Id.*

9 As to factor one, Defendants alone are culpable for their failure to meet
10 a court-ordered deadline. In *Franchise Holding II*, the Court sustained entry
11 of default where the defendant’s culpable conduct was their failure to seek an
12 extension of time to file a responsive pleading. *Id.* Here, the circumstances go
13 a step further. The Defendants sought and received three separate
14 extensions, including a final extension by a Motion to Extend to March 25,
15 2022. (Doc. 14). Defendants still failed to timely file their responsive
16 pleading pursuant to the Court’s Order. Missing the first extended deadline
17 is culpable conduct. Moreso the second, and even moreso the third.

18 As to factor two, the Defendants have filed an Answer, Counterclaim,
19 and Third-Party Claim that state far-fetched claims in an attempt to establish
20 a defense and/or seek offsetting damages. Plaintiffs are unmoved by the
21 Defendants’ allegations and dispute the merits of Defendants’ purported
22 defenses, which are dubious on their face. But at this stage, it is Defendants’
23 responsibility to show that their claims and defenses are meritorious in order
24 to set aside default, and they have not attempted to do so.

25 As to factor three, there is significant, ongoing prejudice to Plaintiffs.
26 Plaintiffs filed this action in November in Maricopa County Superior Court.
27 Plaintiffs have incurred thousands of dollars in fees and costs just to compel
28

1 Defendants to file an answer nearly five months later, after they missed
 2 voluntarily-given and court-ordered deadlines.² These fees and costs will only
 3 continue to mount as Defendants continue to slow this litigation down.
 4 Plaintiffs alleged in Paragraph 13 of their Complaint that Defendants’
 5 businesses were failing and unable to make required payments. (Doc. 1).
 6 Now, several months later, it remains more unclear whether Defendants
 7 would be able to satisfy a judgment rendered against them. Furthermore,
 8 emails and other items have apparently been deleted from Defendants’
 9 servers, which may cause spoliation of evidence prejudicing the Plaintiffs in
 10 this litigation. Prejudice here is clear and significantly in Plaintiffs’ favor.

11 **B. Defendants’ arguments are mistaken or irrelevant.**

12 Defendants argue they “ha[ve] been so initially hindered by
 13 technological cybersecurity concerns that had to be first and foremost
 14 addressed by Defendants.” (Doc. 69 at 2:27-3:2). Defendants continue to state
 15 Plaintiffs “[took] their domains, email accounts, and patient HIPAA data[.]”
 16 (Doc. 69 at 3:7-8). Defendants offer no details regarding this purported issue,
 17 how they “addressed” it, or why it hindered a response. These assertions are
 18 in no way connected to Rule 55(c)’s “good cause” standard. In any event, if
 19 there was such a grave concern, it would have been prudent for Defendants to
 20 quickly file a responsive or an affirmative pleading so that they could seek
 21 timely relief in Court. If Defendants were concerned they lacked sufficient
 22 information, they could have responded to the Complaint that they lacked
 23 sufficient knowledge or information to respond to certain allegations. Fed. R.
 24 Civ. P. 8(b)(5); *see also EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 190
 25

26
 27 ² The Court should consider this Motion alongside Plaintiffs’ Motion to
 28 Remand, which outlines the many ways Defendants have delayed, perhaps
 intentionally, and consistently halted this litigation.

(9th Cir. 1974) (calling defendant's argument that they could not formulate responsive pleadings without more information "frivolous" because they could deny for lack of knowledge or information). Alternatively, they could have sought additional extensions so they could address whatever business concerns took precedent over answering the complaint. They did neither of these things.

III. Conclusion

Defendants have failed to meet their burden of proving good cause to set default aside, as required by Rule 55(c). The Set Aside Motion should be denied.

RESPECTFULLY SUBMITTED this 5th day of May, 2022.

**MAY, POTENZA, BARAN &
GILLESPIE, P.C.**

By /s/ Andrew A. Harnisch
Andrew A. Harnisch
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Kindra Deneau
The Deneau Law Firm, PLLC
64 E. Broadway Road, Suite 200
Tempe, AZ 85282
kindra@deneaulaw.com
Counsel for Defendants

By: /s/ Michelle Giordano

EXHIBIT A

Michelle Giordano

From: Andrew Harnisch
Sent: Monday, December 13, 2021 4:09 PM
To: kindra@deneaulaw.com
Cc: Michelle Giordano
Subject: FW: POCC v Right Path, et al. - Complaint documents
Attachments: 2021-12-10 Summons - Right Path LLC.pdf; 2021-12-10 Summons - Wali.pdf; 2021-12-10 Cert of Comp Arb (FILED).pdf; 2021-12-10 Complaint (FILED).pdf; 2021-12-10 Summons - Jaleela.pdf; 2021-12-10 Summons - Kyona.pdf; 2021-12-10 Summons - Right Path Center.pdf

Kindra,

Please see the attached complaint and summonses that were filed against your clients Rights Path, LLC, Right Path Center, Inc., Wali Muhammed, Jaleela Muhammed, and Kyona Relf.

Please advise whether you are authorized to accept service on behalf of the above-referenced defendants.

Best Regards,

Andy



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com
—

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From: Michelle Giordano <MGiordano@maypotenza.com>
Sent: Monday, December 13, 2021 1:47 PM
To: Andrew Harnisch <AHarnisch@maypotenza.com>
Subject: POCC v Right Path, et al. - Complaint documents

Attached are the filed documents in the Hoeffel matter.



Michelle Giordano

Paralegal

—
o: 602.252.1900

d: 602.774.3504

e: mgiordano@maypotenza.com

—
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EXHIBIT B

Michelle Giordano

From: Kindra Deneau <kindra@deneaulaw.com>
Sent: Monday, December 13, 2021 4:30 PM
To: Andrew Harnisch
Cc: Michelle Giordano
Subject: Re: POCC v Right Path, et al. - Complaint documents

I will check and see and get back to you please give me a day or two.

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From: Andrew Harnisch <AHarnisch@maypotenza.com>
Sent: Monday, December 13, 2021 4:08:47 PM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: FW: POCC v Right Path, et al. - Complaint documents

Kindra,

Please see the attached complaint and summonses that were filed against your clients Rights Path, LLC, Right Path Center, Inc., Wali Muhammed, Jaleela Muhammed, and Kyona Relf.

Please advise whether you are authorized to accept service on behalf of the above-referenced defendants.

Best Regards,

Andy



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com
—

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From: Michelle Giordano <MGiordano@maypotenza.com>
Sent: Monday, December 13, 2021 1:47 PM
To: Andrew Harnisch <AHarnisch@maypotenza.com>
Subject: POCC v Right Path, et al. - Complaint documents

Attached are the filed documents in the Hoeffel matter.



Michelle Giordano

Paralegal

—
o: 602.252.1900
d: 602.774.3504
e: mgiordano@maypotenza.com
—

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EXHIBIT C

Michelle Giordano

From: Kindra Deneau <kindra@deneaulaw.com>
Sent: Tuesday, December 21, 2021 2:35 PM
To: Andrew Harnisch
Cc: Michelle Giordano
Subject: RE: POCC v Right Path, et al. - Complaint documents

Hi Andrew- I have received authorization to accept service. Thank you.

Kindra Deneau, Principal Attorney
480.306.5977
Kindra@DeneauLaw.com

From: Andrew Harnisch <AHarnisch@maypotenza.com>
Sent: Tuesday, December 21, 2021 1:37 PM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: RE: POCC v Right Path, et al. - Complaint documents

Kindra, please let us know today about whether you will accept service. If you are not authorized, we want to be able to send out a process server before we leave the office for the Christmas holiday.

Andy



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com

—
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penalties under the Internal Revenue Code, or (ii) promote, market or recommend to another party any transaction or matter addressed herein (or in any such attachment).

From: Andrew Harnisch
Sent: Friday, December 17, 2021 3:21 PM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: RE: POCC v Right Path, et al. - Complaint documents

That's fine. Let me know by Tuesday.



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com

—
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From: Kindra Deneau <kindra@deneaulaw.com>
Sent: Friday, December 17, 2021 2:49 PM
To: Andrew Harnisch <AHarnisch@maypotenza.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: RE: POCC v Right Path, et al. - Complaint documents

Hi Andrew- With multiple owners, etc., I'm waiting for a bit more input. Please give me until Tues. I anticipate consent.

Kindra Deneau, Principal Attorney
[480.306.5977](tel:480.306.5977)
Kindra@DeneauLaw.com

From: Andrew Harnisch <AHarnisch@maypotenza.com>
Sent: Friday, December 17, 2021 2:03 PM

To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: RE: POCC v Right Path, et al. - Complaint documents

Kindra,

What is the status of acceptance of service?



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com
—

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From: Kindra Deneau <kindra@deneaulaw.com>
Sent: Monday, December 13, 2021 4:30 PM
To: Andrew Harnisch <AHarnisch@maypotenza.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: Re: POCC v Right Path, et al. - Complaint documents

I will check and see and get back to you please give me a day or two.

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From: Andrew Harnisch <AHarnisch@maypotenza.com>
Sent: Monday, December 13, 2021 4:08:47 PM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: FW: POCC v Right Path, et al. - Complaint documents

Kindra,

Please see the attached complaint and summonses that were filed against your clients Rights Path, LLC, Right Path Center, Inc., Wali Muhammed, Jaleela Muhammed, and Kyona Relf.

Please advise whether you are authorized to accept service on behalf of the above-referenced defendants.

Best Regards,

Andy



**May Potenza
Baran & Gillespie**

Andrew Harnisch

Shareholder

o: 602.252.1900

e: aharnisch@maypotenza.com

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From: Michelle Giordano <MGiordano@maypotenza.com>

Sent: Monday, December 13, 2021 1:47 PM

To: Andrew Harnisch <AHarnisch@maypotenza.com>

Subject: POCC v Right Path, et al. - Complaint documents

Attached are the filed documents in the Hoeffel matter.



**May Potenza
Baran & Gillespie**

Michelle Giordano

Paralegal

o: 602.252.1900

d: 602.774.3504

e: mgiordano@maypotenza.com

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EXHIBIT D

Michelle Giordano

From: Michelle Giordano
Sent: Tuesday, December 28, 2021 4:44 PM
To: kindra@deneaulaw.com; lisa@deneaulaw.com
Cc: Andrew Harnisch (AHarnisch@maypotenza.com)
Subject: POCC v Right Path - Acc of Svc
Attachments: 2021-12-27 Acc of Svc.doc

Ms. Deneau:

Attached is the Acceptance of Service. Once you have signed the Acceptance, please return it to me and I will get it filed.

Thank you!

Sincerely,



Michelle Giordano

Paralegal

—
o: 602.252.1900
d: 602.774.3504
e: mgiordano@maypotenza.com
—

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EXHIBIT E

Michelle Giordano

From: Lisa Sandiford <lisa@deneaulaw.com>
Sent: Wednesday, January 19, 2022 5:10 PM
To: Andrew Harnisch; Kindra Deneau
Cc: Michelle Giordano
Subject: RE: POCC v Right Path - Acc of Svc
Attachments: 1-19-2022 Acc of Svc-KD-SIGNED.pdf

Importance: High

Good afternoon, attached please find the signed Acceptance of Service. Thank you for your patience.

Lisa Sandiford, Paralegal & Office Manager
480.306.5977
Lisa@DeneauLaw.com

From: Andrew Harnisch <AHarnisch@maypotenza.com>
Sent: Friday, January 14, 2022 3:04 PM
To: Lisa Sandiford <lisa@deneaulaw.com>; Kindra Deneau <kindra@deneaulaw.com>
Cc: Michelle Giordano <MGiordano@maypotenza.com>
Subject: RE: POCC v Right Path - Acc of Svc

What is going on with this? We sent the acceptance of service over two weeks ago.



Andrew Harnisch

Shareholder

—
o: 602.252.1900
e: aharnisch@maypotenza.com
—

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From: Lisa Sandiford <lisa@deneaulaw.com>
Sent: Tuesday, January 11, 2022 2:36 PM
To: Michelle Giordano <MGiordano@maypotenza.com>; Kindra Deneau <kindra@deneaulaw.com>
Cc: Andrew Harnisch <AHarnisch@maypotenza.com>
Subject: RE: POCC v Right Path - Acc of Svc

Good afternoon Michele, Ms. Deneau just wanted to add a few revisions to the draft Acceptance of Service and we will send that over to you as soon as possible. Thank you for your patience.

Lisa Sandiford, Paralegal & Office Manager
480.306.5977
Lisa@DeneauLaw.com

From: Michelle Giordano <MGiordano@maypotenza.com>
Sent: Monday, January 10, 2022 11:01 AM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Andrew Harnisch <AHarnisch@maypotenza.com>; Lisa Sandiford <lisa@deneaulaw.com>
Subject: RE: POCC v Right Path - Acc of Svc

Kindra:

Just checking on the status of the Acceptance of Service. Please let me know.



Michelle Giordano
Paralegal

—
o: 602.252.1900
d: 602.774.3504
e: mgiordano@maypotenza.com

—
Central Arts Plaza
1850 N. Central Ave., 16th Floor
Phoenix, AZ 85004-4633
www.maypotenza.com

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penalties under the Internal Revenue Code, or (ii) promote, market or recommend to another party any transaction or matter addressed herein (or in any such attachment).

From: Kindra Deneau <kindra@deneaulaw.com>
Sent: Monday, January 3, 2022 5:21 PM
To: Michelle Giordano <MGiordano@maypotenza.com>
Cc: Andrew Harnisch <AHarnisch@maypotenza.com>; Lisa Sandiford <lisa@deneaulaw.com>
Subject: RE: POCC v Right Path - Acc of Svc

Will have these back to you tomorrow. Thank you.

Kindra Deneau, Principal Attorney
480.306.5977
Kindra@DeneauLaw.com

From: Michelle Giordano <MGiordano@maypotenza.com>
Sent: Monday, January 3, 2022 11:52 AM
To: Kindra Deneau <kindra@deneaulaw.com>
Cc: Andrew Harnisch <AHarnisch@maypotenza.com>; Lisa Sandiford <lisa@deneaulaw.com>
Subject: FW: POCC v Right Path - Acc of Svc

Kindra:

I just wanted to check on the status of the attached. Please let me know.

Thank you and hope you had a great New Year!

Sincerely,



**May Potenza
Baran & Gillespie**

Michelle Giordano
Paralegal

—
o: 602.252.1900
d: 602.774.3504
e: mgjordano@maypotenza.com
—

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From: Michelle Giordano

Sent: Tuesday, December 28, 2021 4:44 PM

To: kindra@deneaulaw.com; lisa@deneaulaw.com

Cc: Andrew Harnisch (AHarnisch@maypotenza.com) <AHarnisch@maypotenza.com>

Subject: POCC v Right Path - Acc of Svc

Ms. Deneau:

Attached is the Acceptance of Service. Once you have signed the Acceptance, please return it to me and I will get it filed.

Thank you!

Sincerely,



Michelle Giordano

Paralegal

—
o: 602.252.1900

d: 602.774.3504

e: mgiordano@maypotenza.com

—
Central Arts Plaza
1850 N. Central Ave., 16th Floor
Phoenix, AZ 85004-4633
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